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No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
vs.
CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HALGROVE,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR CALIFORNIA TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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BRIEF FOR CALIFORNIA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF AMICUS CURIAE

The California Trial Lawyers Association ("CTLA"), founded in 1962, is a voluntary organization composed of approximately 5,000 trial lawyers who appear regularly in state and federal courts. The predominant practice of most CTLA members is the representation of injured tort victims and victims of consumer fraud. As such, CTLA is concerned with issues which implicate the rights of victims and consumers.[1]

CTLA believes Petitioner and its amicus, Association For California Tort Reform (ACTR), has presented a distorted view of what is really going on in the States with respect to punitive damage judgments *which defendants are actually ordered to pay*. As their "tort reform" movement marches from its substantial successes in the state legislatures to this Court, the requested radicalization of the federal relationship with respect to state tort law will dramatically alter not only punitive damages, but also compensatory damages and criminal sentencing—matters traditionally reserved to the states. It is these issues which CTLA wishes to discuss.

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[1] A letter consenting to the filing of this amicus curiae brief by counsel for respondents is being filed concurrently. Pursuant to an agreement between counsel for petitioners and respondents, such consent from counsel for the party in whose support the amicus curiae brief is being filed is deemed to be consent from both counsel.

I

RECENT LEGISLATIVE CHANGES IN THE STATES' PUNITIVE DAMAGE SYSTEMS ARE HAVING A DRAMATIC EFFECT ON THE SIZE AND NUMBER OF PUNITIVE AWARDS; THE STATES ARE NOT ABUSING THE RIGHTS WHICH THEY RETAINED WHEN THEY ENTERED THE FEDERAL UNION.

As "tort reform" sweeps the nation, lobbyists for insurance and business concerns, such as ACTR, are getting much of what they are asking for. As a result, punitive damages have been sharply limited in recent years through new "tort reform" legislation. As of this date, the majority of states have enacted laws significantly restricting punitive damages.[2]

Lobbyists such as ACTR have been massively successful in convincing state legislatures to select a variety of restrictive

[2]*See* Ala. Code § 6-11-20 *et seq.* (Supp. 1988); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990); Colo. Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986); Conn. Gen. Stat. § 52-240(b) (Supp. 1989) (applicable to product liability cases); Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989); Ga. Code Ann. § 51-12-5.1 (Supp. 1989); Idaho Code § 6-1604 (Supp. 1989); Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989); Ky. Rev. Stat. §§ 411.184, 411.186 (1988); Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988); Mo. Ann. Stat. §§ 510.263 (Vernon Supp.1990), 537.675 (Vernon Supp. 1988); Mont. Code Ann. § 27-1-221 (1987); Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases) 18.540, 41.315 (1987); S.C. Code Ann. § 15-33-135 (Supp. 1988); S.D. Rev. Code § 21-1-4.1 (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 *et seq.* (Vernon Supp. 1990); Utah Code Ann. § 78-18-1 (Supp. 1989); Va. Code Ann. 8.01-38.1 (Supp. 1989).

devices from their agenda. However, only nine states have adopted the one device which is most important to Petitioner and its amici—a cap on the dollar amount of punitive awards.[3] Other states may well decide to follow the lead and place a statutory outer limit on such awards. Such is the proper business of legislatures. However, due to either impatience with the deliberative processes of the state legislatures, or frustrated by temporary defeats before some state legislatures, the insurance and business community has now turned to this Court to give it the device it most cherishes by finding within the boundaries of the Fourteenth Amendment a cap on punitive damages.[4]

Thus, in the very midst of the current debate going on within the state legislatures, and in order to short-circuit that process, the insurance and business lobby is (to borrow the words of Justice White from *Moore v. East Cleveland*, 431 U.S. 494, 544) asking the Judiciary "to pre-empt[] for itself another part of the governance of the country without express constitutional authority."

What makes this short-circuiting and pre-empting of a function ordinarily reserved to the states particularly sad and tragic is the empirical fact that these newly-enacted punitive damage reforms are having a dramatic effect in limiting such awards.

[3]*See* Ala. Code § 6-11-21; Colo. Code § 13-21-102(1)(a); Fla. Code § 768.73(1)(a); Georgia Code § 51-12.5.1(g); Kansas Code § 60-3701(e); Nevada Code § 42.005.1; Oklahoma Code Title 23, § 9; Texas Code § 41.007; Virginia Code § 8.01-38.1. In addition, the Connecticut Supreme Court, in *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 116, 222 A.2d 220 (1966), held that an award of punitive damages is limited to plaintiff's litigation expenses less taxable costs.

[4]If this Court imposes such a restriction on the State legislatures, then Michael Milken ought to think twice about a plea bargain which could result in 600 million dollars in penalties.

California's Tort Reform Act, which included extraordinary changes as to punitive damages, went into effect on January 1, 1988. From 1987 to 1988, the number of punitive damage verdicts in excess of $100,000 went from 62 to 29, *i.e., a reduction of 53%!* The difference in the total amount of punitive awards from 1987 to 1989 represents *a reduction of 60%!* (*See* Appendix A and page 4 of Brief of ACTR.)

Thus, while the state "laboratories" are not only in fact experimenting with devices to limit and circumscribe punitive awards based upon the economic and social theories adopted by each state, and as these experiments are beginning to show positive and dramatic results, Petitioner and its amici seek to have this Court simply shut that process down and impose a "constitutionally"-mandated cap on punitive awards. This, the Framers did not envision.[5]

II

SUBSTANTIVE AND PROCEDURAL LIMITATIONS ON PUNITIVE DAMAGES ARE NOT ONLY IN PLACE BUT ARE EVOLVING AS THE PRODUCT OF CURRENT LEGISLATIVE PROCESSES—THE CALIFORNIA MODEL.

If it is assumed that Due Process serves as a check on punitive damage awards that are "so severe and oppressive as to be wholly disproportionate to the offense or obviously unreasonable" (*Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909)), and it is assumed that "Due Process requires more" (Brief of Petitioner at 49), and it is assumed that this is one of

[5]This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself." *Cruzan v. Director, Missouri Dept. of Health*, ___ U.S. ___, No. 88-1503 (June 25, 1990) (Scalia, J., concurring.)

those "rare occasions"[6]—unlike capital sentencing, unlike defamation awards and unlike compensatory tort awards in general—where the Court chooses to dictate the use of specific devices to the states with respect to their punitive damage systems, what devices are mandated by the Fourteenth Amendment?

Petitioner gives the Court no guidance whatsoever. It seeks imposition of a "range of permitted punishment" but offers not a clue as to the form or substance of whatever it sees lurking within the Due Process Clause.

Respondents, on the other hand, have addressed themselves to the "active re-examination underway in the States" as a response to this Court's invitation in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645 (1988) to "enact legislation addressing punitive damage awards," 108 S.Ct. at 1651. Respondents discuss the array of creative and innovative devices and procedures being enacted by the state legislatures to limit and channel punitive damage awards so as to meet the social and economic policy goals which have been adopted through the balancing process of each individual legislature (Respondents' Brief in Opposition at 19-21).

The recent restructuring of its punitive damage system by an increasingly more conservative California Legislature and Judiciary is illustrative of the appropriate exercise of the States' power (in direct response to the electorate) "to choose among competing social and economic theories in the ordering of life within their respective jurisdictions" and (to paraphrase Justice Brennan (from *McGautha, supra*)), to determine for themselves the criteria under which malicious tortfeasors should be assessed punitive damages.

[6]*McGautha v. California*, 91 S.Ct. 1459, 402 U.S. 183, 28 L.Ed.2d 711 (1971).

A. Statutory Limitations on Punitive Damage Awards.

Since originaliy enacting the basic punitive damage statute, Civil Code section 3294,[7] in 1872, the California Legislature has frequently and regularly made various policy decisions, selecting from a menu of competing economic and social policies.

1. Procedural Safeguards Applicable To The Assessment Of Punitive Damages.[8]

(a) Civil Code section 3295(d) [mandatory bifurcation of trial; preclusion of evidence of defendant's profits or financial conditions until finding of malice, fraud or oppression; right to same jury].

(b) Civil Code section 3294(a) ["clear and convincing" standard of proof required].

(c) Civil Code section 3295(e) [prohibition against stating amount of punitive damages in claim].

(d) Civil Code section 3295(a) [protective order requiring plaintiff to produce evidence of a prima facie case of malice, fraud or oppression prior to introduction of evidence of defendant's profits or financial condition].

(e) Civil Code section 3294(a) [prohibition on pretrial discovery of defendant's net wealth without a prima facie showing of malice, fraud or oppression].

(f) Code of Civil Procedure section 425.13 [court order

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[7]California is one of eight states whose punitive damage systems are based on statute as opposed to the common law. Nonetheless, it is a codification of the common law. *Bertero v. National General Corp.*, 13 Cal.3d 43, 66, n.13 (1974).

[8]Most of these safeguards were instituted by the 1987 Tort Reform Act which was passed subsequent to the "warning shot" fired in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

required to plead punitive damages against health care provider).

(g) Civil Code section 48a [hatred or ill will toward plaintiff required for punitive damages against media].

2. Limitations On Liability For Punitive Damages.

(a) Civil Code section 3294(b) (no vicarious liability for punitive damages and no punitive damages based on respondeat superior).[9]

(b) Civil Code section 3294(a) (punitive damages permissible only upon clear and convincing showing of malice,[10] fraud or oppression).

(c) Civil Code section 3294(c) ("(1) 'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a wilful and conscious disregard of the rights

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[9]"(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." Section 3294(b).

The California Supreme Court has defined "managerial capacity," and juries are instructed, as follows: "An agent or employee acts in a managerial capacity where the degree of discretion permitted the agent or employee in making decisions is such that the agent's or employee's decisions will ultimately determine the business policy of the principal or employer." Book of Approved Jury Instructions, Civil, Instruction No. 14.74; *Egan v. Mutual of Omaha*, 24 Cal.3d 809, 822 (1979).

[10]As originally enacted, section 3294 permitted punitive damages upon a showing of "malice, express or implied." The statute was amended to delete the words "express or implied."

or safety of others. [The Book of Approved Jury Instructions, Civil, provides that the jury is to be instructed as follows: "'Despicable conduct' is conduct which is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people." (Instruction No. 14.71.)] (2) 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (3) 'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.")[11]

3. Limitations On Actions In Which Punitive Damages Allowed.

(a) Civil Code section 3294 [not allowable in contract actions].

(b) Civil Code section 956 [not allowed in wrongful death action].

(c) Code of Civil Procedure section 734 [certain trespasses, actual damages only].

(d) Government Code section 818 [no punitive damages against governmental entity].

(e) Civil Code section 3340 [injury to animals].

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[11]*Compare Walton v. Arizona*, _____ S.Ct. _____, 58 U.S.L.W. 4992 (June 27, 1990) where the Court upheld, against a charge of unconstitutional vagueness and as providing "sufficient guidance to the sentences," Arizona's definitions of its "especially heinous, cruel or depraved" aggravating factor which is a necessary predicate, under Arizona's death penalty statute, to a capital sentence. ("[A] crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death." "Depraved" was defined as when the perpetrator "relishes the murder, evidencing debasement or perversion," or "shows an indifference to the suffering of the victim and evidences a sense of pleasure" in the killing.)

B. Judicial Limitations On Punitive Damages.

1. Constitutional Limitations—In California, Civil Penalties Are Measured Against Due Process Requirements On A Case-By-Case Basis And Those Penalties Which "Demonstrably Overbalance And Outweigh Reasonable Goals Of Punishment, Regulation And Deterrence" Are Invalidated.

The California Supreme Court is not the least bit hesitant to invalidate a civil penalty in any given case based on the Due Process Clauses in the federal and state constitutions:

> "The due process clauses, federal and state, are the most basic substantive checks on government's power to act unfairly or oppressively. As such, they protect against infringements by the state upon those 'fundamental' rights 'implicit in the concept of ordered liberty.' (*Palko v. Connecticut* (1937) 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288.)
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> * * *
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> "The due process shield, while protecting life and liberty, of course, has similar application in the protection of property. Courts have consistently assumed that 'oppressive' or 'unreasonable' statutory penalties may be invalidated as violative of due process. (See, e.g., *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 642, 268 P.2d 723.) We therefore examine section 789.3 to determine whether, either as enacted or as specifically applied (*Boddie v. Connecticut* (1971) 401 U.S. 371, 379-380, 91 S.Ct. 780, 28 L.Ed.2d 113), the penalties therein authorized are reasonable and proper or arbitrary and oppressive." *Hale v. Morgan*, 22 Cal.3d 388, 398-399, 584 P.2d 512 (1978).

In *Hale*, the court concluded that the imposition of a $17,300 penalty against an unsophisticated landlord under a statute which assesses a penalty of $100 per day against a landlord who wilfully deprives his tenant of utility services for purposes of evicting the tenant was constitutionally excessive and violative

of due process. As the California Supreme Court observed:

> "Though the Legislature need not, of course, precisely adjust its regulatory efforts to ensure exact justice in every case, neither may it, in defiance of due process requirements, compel the exaction of penalties which, in a particular case, demonstrably overbalance and outweigh reasonable goals of punishment, regulation and deterrence." (*Id.* at 402.)
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> * * *
>
> "Where, as here, a penal statute may be subject to both constitutional and unconstitutional applications courts evaluate the propriety of the sanction *on a case-by-case basis*." (*Id.* at 404; emphasis added.)
>
> * * *
>
> "We are of the view however, that under all of the circumstances of this case the amount of the penalties is constitutionally excessive." (*Id.* at 405; emphasis in original.)
>
> "Similarly, in *Walsh v. Kirby* (1974) 13 Cal.3d 75, 118 Cal.Rptr. 1, 529 P.2d 33, the California Supreme Court held cumulative penalties violative of Due Process principles.

2. Jury Discretion In California Is Anything But "Standardless."

(a) California Law Imposes Multiple And Well-Defined Standards Of Proportionality, Which The Trier Of Fact, Trial Court And Reviewing Courts Are Obligated To Apply.

During oral argument in *Bankers Life*, Justice Scalia asked counsel for Plaintiff and Respondent whether a criminal statute would be constitutional (presumably under the Due Process clause) if the fine were jury-determined and limited only by: (1) "It shall not shock the judicial conscience," (2) "it shall not deprive the defendant of a livelihood," and (3) "it shall not be disproportionate to the offense" (Transcript, Monday, November 30, 1987, at 40). That question would never have to be asked under California law.

> "In making the indicated assessment we are afforded guidance by certain established principles, all of which are *grounded in the purpose and function of punitive damages*. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility,[12] and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. [Citations.] Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionately high amount of punitive damages if the actual harm suffered thereby is small. [Citation.] Also to be considered is the wealth of the particular defendant;[13] obviously, the function of deterrence . . . will not

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[12]Petitioner's amicus, The Association For California Tort Reform, argues that "'Reprehensibility' Provides No Meaningful Guidance To A Jury" (Brief of ACTR at 10). Although the word has been found vague in other circumstances (*see Giaccio v. Pennsylvania*, 382 U.S. 399, 404-405 (1966), it must be viewed in context here. The jury does not determine the amount of punitive damages unless it has already determined that the conduct of the defendant was malicious, oppressive, or fraudulent. The term "reprehensible" *relates to that prior determination*. The jury merely considers the proved conduct as part of its analysis to determine the appropriate amount to punish the defendant.

[13]ACTR, as amicus for Petitioner, argues that evidence of wealth "becomes less and less meaningful as 'wealth increases, to the point of providing no guidance whatsoever when a multi-million or multi-billion dollar corporation is involved.'" (Brief of ACTR at 10-11.)

To the contrary, the cases discussed herein (*see, e.g., Neal v. Farmers Ins. Exchange, infra*, 21 Cal.3d 910, 929), demonstrate that using wealth as a factor produces reasonable awards when considered as a percentage of net worth or earnings. Petitioner and amicus' real complaint is that the wealth factor

(continued...)

be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." *Neal v. Farmers Ins. Exchange, supra*, 21 Cal.3d 910, 928, 148 Cal.Rptr. 389 (1978).

California juries are strictly instructed to follow each of these "established principles" in formulating an award of punitive damages. (*See* Book of Approved Jury Instructions, Civil, BAJI Nos. 14.71 (1989 Revised), 14.72.1 (1989 Re-Revision), 14.73 (1989 New), and 14.73.1 (1989 New).[14] The jury is also given the statutory definitions of "malice," "fraud" and "oppression" as well as the above-referenced definition of "despicable conduct." (*Id.*)

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[13](...continued)
means that deterrence considerations may result in larger awards against wealthier defendants. This is as it should be. Indeed, in her dissent in *Browning-Ferris*, Justice O'Connor quoted as follows from 4 Blackstone, *Commentaries*, page 371: "[T]he *quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's." (109 S.Ct. at 2933.)

The "ratio-of-punitive-damages-to-actual-damages" factor is similar to the "wealth" factor. It is capable of mathematical determination. The fact that it may be subjugated to the other factors on occasion (*Neal v. Farmers Ins. Exchange, infra*, 21 Cal.3d 910, 929), does not render it or the whole scheme of guidelines vague.

[14]A punitive award rendered by a jury which has not been instructed that the award must bear a reasonable relationship to the compensatory damages is subject to reversal. *Gagnon v. Continental Casualty Co.*, 211 Cal.App.3d 1598, 260 Cal.Rptr. 305 (1989).

(b) In California, Evil Motive Is The Central Element Of Malice And Is Not Established By Conduct Which Is Unreasonable, Negligent, Grossly Negligent Or Reckless.

In *Smith v. Wade*, 461 U.S. 30, 48, 103 S.Ct. 1625, 1636, 75 L.Ed.2d 632 (1983), this Court observed that most cases under state common law permit punitive damages based on "recklessness, . . . or even gross negligence."[15] Not so in California.

"*Animus malus* or evil motive, . . . is the central element of the malice which justifies an exemplary award. [Citation.]" . . .

"[S]ection 3294 views evil motive as the central essential factor in the malice which justifies an exemplary award. That factor calls upon the jury to assess the defendant's actual state of mind; it is not satisfied by characterizing his conduct as unreasonable, negligent, grossly negligent or reckless.[16] [Citation.]" *G.D. Searle & Co. v. Superior Court of Sacramento*, 49 Cal.App.3d 22, 30-31, 122 Cal.Rptr. 218, 223-224 (1975).

"Malice as used in Civil Code section 3294 means malice in fact, not malice in law. [Citation.] 'There must be an intent to vex, annoy or injure. Mere . . . negligence, even gross negligence is not sufficient to justify an award of punitive damages' (quoting *Ebaugh v. Rabkin* (1972) 22 Cal.App.3d 891, 894, 99 Cal.Rptr. 706, 709)." *Simmons v. So. Pac. Trans. Co.*, 62 Cal.App.3d 341, 368, 133 Cal.Rptr. 42, 58 (1976).

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[15]Indeed, the majority itself in *Smith v. Wade* rejected the position of the dissent that punitive damages should only be available for a violation of 42 U.S.C. § 1983 upon a showing of "some degree of bad faith or improper motive . . . ."

[16]A showing of constructive knowledge is insufficient. *Bell v. Sharp Cabrillo Hospital*, 212 Cal.App.3d 1034 (1989).

(c) The Discretion of California Juries Is Further Checked By Elected Judges Who, On Motions For New Trial, Sit As "Independent Triers Of Fact," And Are Mandated To Reweigh The Evidence And To Review Jury-Decided, Punitive Awards.

In *Bankers Life*, Justice O'Connor observed that, under Mississippi law, "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury" (108 S.Ct. at 1656, quoting the opinion below). *This is not the law in California.*

> "[T]he trial court, in ruling on the [new trial] motion, sits not in an appellate capacity but as an independent trier of fact." *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 933, 148 Cal.Rptr. 389, 402 (1978).
>
> "The trial judge not only has the discretion to grant a new trial on the ground of excessive damages, but it is his duty to do so, or to provide for a reduction of the verdict, if under the evidence he believes it to be too large. . . .
>
> "As heretofore indicated the 1967 amendments to Code of Civil Procedure, section 657 eliminated the words 'appearing to have been given under the influence of passion or prejudice' as part of the stated ground for granting a new trial for excessive damages. . . .
>
> "[I]t is the exclusive province of the trial court to judge the credibility of the witnesses, to determine the probative force of testimony and to weigh the evidence, and it may draw reasonable inferences therefrom opposed to those drawn by the trier of fact at the trial." (Quoting *Yarrow v. State of California*, 53 Cal.2d 427, 434, 2 Cal. Rptr. 137.) *Collins v. Lucky Markets, Inc.*, 5 Cal.App.3d 705, 85 Cal.Rptr. 350, 458-459 (1969).

California Code of Civil Procedure section 662.5 provides for the trial court to issue a remittitur "of so much [of the verdict] as the court *in its independent judgment determines from the evidence to be fair and reasonable*" (emphasis added). *Also*

see Neal v. Farmers Ins. Exch., supra.

> "It has been repeatedly held that after a jury award of exemplary damages, it becomes the province of the trial court on motion for new trial to say whether the amount is excessive." *Ferraro v. Pacific Finance Corp.*, 8 Cal. App.3d 339, 351, 87 Cal.Rptr. 226, 233 (1970).

Thus, judges who are elected by the citizenry of California are mandated to sit as independent triers of fact and to exercise broad powers to limit any award of punitive damages.

(d) The Discretion Of California Juries Is Still Further Checked By Active And Aggressive Appellate Review.

(1) *Reported Decisions, Each Employing A Proportional Analysis, Produce Punitive Judgments With An Average Percentage Of Net Worth Of 3.41.*

The proportional analysis which Petitioner asks this Court to constitutionally impose on the states with respect to punitive damages (and, presumably, to have the federal courts review on a case-by-case basis) is already in place and functioning well in California. In *Devlin v. Kearney Mesa AMC/Jeep/Renault Inc.*, 155 Cal.App.3d 381, 202 Cal.Rptr. 204 (1984), the court performed a summary review of reported decisions to proportionally compare punitive damage awards, after appellate review, as a function of the defendant's net worth and net income. The court attached the results of its survey as an appendix to its decision. The study revealed that the average "percentage of net worth" ratio was 3.41% and the average "percentage of net income" ratio was 3.14%.

Based on this survey, the California Court of Appeal recently, in *The People ex rel. Dept. of Transp. v. Grocers Wholesale Co.*, 214 Cal.App.3d 498 (1989), reversed a punitive award of $75,000 reasoning that punitive damage awards which are "significantly lower" than 10% of the defendant's net worth are

indeed the norm."[17]

(2) *Amicus ACTR's Graph Concerning Recent Trends Is Illusory.*

The brief of the Association For California Tort Reform, as amicus for Petitioner, contains a chart purporting to summarize punitive damage jury verdicts in California from 1976 to 1989, and a graph visually depicting the survey results. (*Id.* at 4-5.) Nothing could be more misleading.

First, one verdict rendered in each of the three years (*i.e.*, 1978, 1985 and 1988)—which years tower over the other years in ACTR's "graph" like giraffes among Pygmies—amounts to 91%, 34% and 52%, respectively, *of that year's total awards!*[18]

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[17]*See Burnett v. National Enquirer, Inc.*, 144 Cal.App.3d 991, 1011-1012 (1983) [award equalling 15% of net worth excessive]; *Little v. Stuyvesant Life Ins. Co.*, 67 Cal.App.3d 451, 469-470 (1977) [award equalling 15% of net worth excessive]; and *Merlo v. Standard Life & Acc. Ins. Co.*, 59 Cal.App.3d 5, 18 (1976) [award exceeding 30% of net worth excessive].

[18]The punitive damage award in *Grimshaw v. Ford Motor Co.*, which constitutes 91% of the first (*i.e.*, 1978) of the three tall towers which stand out in the graph in ACTR's brief, never even saw the light of appellate review. The trial judge remitted 97.2% of the award. As drastically remitted, this amount was affirmed on appeal. *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 174 Cal.Rptr. 348 (1981). By factoring into the chart the actual judgment in *Grimshaw*, instead of the historical curiosity of the verdict, ACTR's first towering bar on its graph shrinks to the width of the pencil line used to draw it. Moreover, this aberrant verdict is hopefully a reflection that the defendant's conduct was aberrant. Evidence was introduced at trial that showed the automaker calculated it was cheaper to pay damages to the families of those killed in fiery crashes than to install a $25 part.

The foundation of the second big year in the graph was *Micro/Vest v. Computerland*. The punitive award there was a mere 30% of the compensatory award of $416,000,000 in an on-going battle between a computer giant and its investors.

The third verdict, which represents over one-half of the third towering bar (*i.e.*, 1988) on ACTR's graph is the massive "Technical Equities" fraud case in which $50,000,000 was fraudulently extracted from the public through the

(continued...)

Shorn of these three doppelgangers, the past five years in California have demonstrated a decidedly and steady *downward* trend *in both the number and dollar amount* of punitive damage verdicts in California! The "punitive monster" which Petitioner and amicus see "growing on the civil side" (Brief of ACTR at 3) is indeed a phantasm.

(3) *Only 9% of the Punitive Damage Dollars in California Reported Cases Survive Appellate Review.*

As Petitioner and its amici exhort the lack of due process in state punitive damage systems,[19] the exclusive focus is upon the verdict of the jury. Petitioner offers the Court, as an appendix, a list of jury verdicts and refers the Court to their amicus ACTR's similar appendix to impress upon the Court "the sheer magnitude of present punitive damages awards" (Brief of Petitioner at 37.) What Petitioner ignores is—at least in California—only 9% of such awards in published decisions

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[18](...continued)
Technical Equities corporate shell. That verdict has not resulted in any judgment. The case is still before an intermediate state court of appeal.

[19]ACTR, as amicus for Petitioner, has provided the Court with a chart purporting to provide information concerning the results of new trial motions as to punitive awards (Appendix B). The accuracy of the chart is, again, questionable. Unable to check every "source" for accuracy, the author of CTLA's Brief herein simply noticed that one of the cited cases, *Kasparian v. Fremont Indemnity* (*id.* at B-28) was handled by him and, therefore, he was personally aware of the results of the new trial motion. Although ACTR states that the motion was "denied," in fact the trial court remitted a substantial portion of the punitive award. The case is currently on appeal. Since the authors of ACTR's brief clearly would not misrepresent this information, it is obvious that the "source" of their "study" was, at least in some respects, inaccurate. In California, the trial judge does not directly order that a portion of an award be remitted. Rather, he grants a new trial unless the plaintiff agrees to such a remittitur. If the remittitur is accepted, then the motion for new trial is "denied." *Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 148 Cal.Rptr. 389, 582 P.2d 980 (1978). This may be part of the problem with ACTR's statistical "study."

ever survive the appellate process, which is as much a part of the punitive damage system as the jury verdict. Attached hereto as Appendix A is a fairly exhaustive chart of available opinions of the California Courts of Appeal and Supreme Court, decided between 1922 and 1986, in which the excessiveness of a punitive award was examined.[20] The amount of the award, and how it was treated by the trial and reviewing courts, is analyzed for each of 71 cases. Such empirical analysis definitively dispels the wholly unsupported and pejorative notion that, in California at least, the substantive and procedural due process rights of punitive damage defendants are left unchecked.

Out of all 71 cases, in 42 (or *60%*), the courts have ordered the punitive award to be either reduced or reversed. Out of the 23 cases involving awards of $500,000 or more, 18 (or *78%*) have been reduced or reversed. Out of the 19 cases involving awards of one million dollars or more, 16 (or *85%*) have been reversed or remanded. Out of the total dollar amount of all 71 punitive awards, *91%* have been judicially excised, *leaving only 9% to serve as the basis of a final judgment against the defendant.*

Even the statistics set forth in amicus ACTR's brief (*see* Appendix B, Figure 2, and pp. 6-7 of their Brief), the accuracy of which is questionable (*see* footnote 21 herein), indicate that trial judges—before any appellate court scrutiny—*grant new trials or remit punitive awards 46% of the time and reduce such awards by 45%.*

Petitioner refers to appellate review as involving "no more than the 'gentle test of excessiveness'" (Brief of Petitioner at 47). Yet, while its amicus, ACTR, uses a bar graph to demon-

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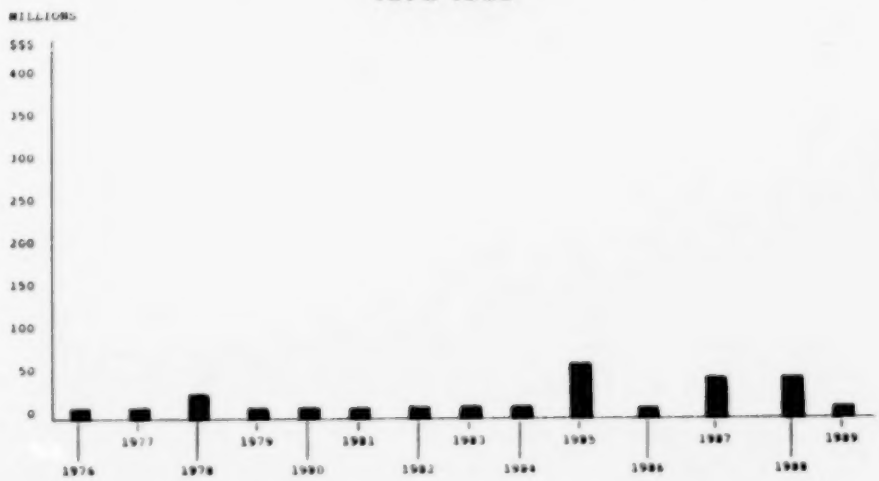
[20]In California, unpublished appellate opinions are not available and only published opinions may be used as precedent to guide the courts in conducting any proportional analysis of punitive damage awards. California Rules of Court, rule 977(a)(b)(1)-(2).

strate "trends" with respect to jury *verdicts*, when it discusses *trial court review* of such verdicts, it switches to a pie chart so that these "trends" will not be revealed. When it comes to *appellate review*, ACTR simply ignores it.

A jury has no power to deprive any civil defendant of anything. Only a final judgment—entered after a full opportunity for review by the trial court and by the courts of appeal—can command the payment of money from a civil defendant. If the raw verdict statistics of ACTR's bar graph is reduced to the 9% of punitive awards which actually go to final judgment, it would look like this:

CALIFORNIA JURY ***FINAL JUDGMENTS*** OVER $100,000

1976-1989



CALIFORNIA PUNITIVE DAMAGE ***FINAL JUDGMENTS***
FOR $100,000 OR MORE

III

PROPORTIONALITY BASED ON "ANALOGOUS CRIMINAL PENALTIES" IS NOT PROPORTIONAL IF THE ANALYSIS EXCLUDES THE PRINCIPAL MEANS OF DETERRENCE–INCARCERATION.

Advancing its "disproportionate award/due process" theory, Petitioner asks:

> "Compare the recent punitive damages award in Appendix A to the statutory criminal fines in Appendix B. They are shockingly disproportionate" (Brief of Petitioner at 34.)

Petitioner's Appendix B lists the fines for Class A felonies as $20,000, Class B felonies as $10,000, Class C felonies as $5,000 (Ala. Crim. Code §§ 13A-5-11), Class A misdemeanors as $2,000, Class B misdemeanors as $1,000, and Class C misdemeanors as $500 (Ala. Crim. Code §§ 13A-5-12). Then, by comparing these penalties to punitive damage awards, the disproportion becomes "shocking."

However, Petitioner is comparing the height of a giraffe to the length of an elephant's trunk, while pretending the rest of the elephant doesn't exist. Petitioner completely ignores the principal aspect of the penalty for felonies and misdemeanors, *i.e.*, incarceration. Class A felonies in Alabama carry a mandatory prison term of 10-99 years; Class B felonies, 2-20 years; Class C felonies, 1-10 years (Ala. Crim. Code § 13A-5-6); Class A misdemeanors, up to one year; Class B misdemeanors, up to six months; and Class C misdemeanors, up to three months (Ala. Crim. Code § 13A-5-7). Moreover, section 13A-5-2(e) reserves to the court the right "to forfeit property, dissolve a corporation, suspend or cancel a license . . . or impose any other lawful civil penalty."

Thus, a true *proportionate* analysis would compare the $1,000,000 punitive damage award (whether it represents one week or one month of net income to the defendant) with the

above stated "analogous" criminal penalties. These "analogous" penalties range from 99 years in jail and a $25,000 fine to three months in jail and a $500 fine. Apart from implications of stigma, probation, loss of voting rights, and recidivist problems associated with a criminal sentencing, a corporate defendant earning $1,000,000 a week in net income would suffer a loss of income of $120,000,000 for a Class C misdemeanor, $240,000,000 for a Class B misdemeanor, and $480,000,000 for a Class A misdemeanor.

As it compares the entirety of civil punitive damage awards with only a minor aspect of criminal penalties (*i.e.*, fines) while ignoring the principle element (*i.e.*, imprisonment), the "analogous criminal penalties" argument is spurious.

IV

IF PETITIONER'S SUBSTANTIVE DUE PROCESS ARGUMENT IS ACCEPTED, THEN, IN LIGHT OF *McGAUTHA*, A SMALL FRACTION OF A PERSON'S ASSETS WILL BE AFFORDED GREATER PROTECTION THAN THAT AFFORDED HIS LIFE.

The current debate was framed by Justice O'Connor in her concurrence in *Bankers Life*, at 486 U.S. 87-88:

> ". . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

Justice Blackmun, in his majority opinion in *Browning-Ferris*, stated the issue as follows:

> ". . . whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit."

The subject of this debate is punitive damage awards extracted from defendants, who maliciously or fraudulently injure others, and which amount to a small percentage of their

net worth or net income.[21]

When this Court examined the due process implications of state systems for sentencing defendants to death in *McGautha v. California*, 91 S.Ct. 1454, 402 U.S. 183, 28 L.Ed.2d 711 (1971), it held as follows:

> "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that *committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.*[] The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel." (Emphasis added.)

As Justice Douglas pointed out in his dissent in *McGautha*: "Under Ohio law the determination of whether to grant or withhold mercy is exclusively for the jury and cannot be reviewed by either the trial court or an appellate court."

The question, then, becomes as obvious as it is simple: Even if the amount of a punitive damage award were the product of "standardless jury discretion," why is the deprivation of a small amount of a person's assets or income violative of due process while the deprivation of his life is not?—particularly when the

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[21]The $1.6 million punitive damage award upheld in *Bankers Life* was less than one percent of the defendant's net worth. The $3.5 million punitive damage award the Supreme Court let stand in *Allstate Ins. Co. v. Hawkins*, in the same term, was only 1/25th of 1% of the defendant's reported assets. In *Browning-Ferris*, the punitive award amounted to .6% of the defendant's net worth and 5% of its net annual income. The punitive award in *Metromedia v. April Enterprises*, let stand last term, was one-half of 1% of the defendant's net worth and one week of net income.

former is the subject of trial court and appellate review and the latter is not.[22]

V

THE REASONS WHICH LED TO THE *McGAUTHA* RULING APPLY HERE WITH GREATER FORCE—*i.e.*, A MECHANISTIC APPROACH TO SENTENCING, WHICH IS INCAPABLE OF APPLYING REASONED DISCRETION TO INDIVIDUAL CIRCUMSTANCES, IS NO FRIEND OF DUE PROCESS.

Punitive damage juries are told to consider the nature and purpose of punitive damages, *i.e.*, punishment, example and deterrence, and to fashion an award by considering the reprehensibility of the conduct found to be malicious, fraudulent or oppressive, the net worth of the defendant, and a reasonable relationship to the compensatory damages.

In the California case reviewed in *McGautha*, the jury was instructed:

> "Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury."

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[22]More protective procedures are required if the action is criminal rather than civil, or if the interest involved is life or liberty, rather than property. *See Parratt v. Taylor*, 451 U.S. 527 (1981).

"This Court has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Cruzan v. Director, Missouri Dept. of Health*, ____ U.S. ____, No. 88-1503 (June 25, 1990) (quoting *Santosky v. Kramer*, 495 U.S. 745, 756 (1982)).

In the Ohio case, the jury was simply given no instruction at all in this regard. The instruction approved in *Andres v. United States*, 333 U.S. 740, 68 S.Ct. 880, 92 L.Ed. 1055 (1948) provided:

> "'This power [to recommend mercy] is conferred solely upon you and in this connection the Court can not extend or prescribe to you any definite rule defining the exercise of this power, but commits the entire matter of its exercise to your judgment.' *Id.* at 743, n. 4, 68 S.Ct. at 882."

In holding that this admittedly standardless jury discretion to determine the severity of a criminal penalty was not violative of due process, the majority reasoned as follows:

> "Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."
>
> "[However (quoting from the Royal Commission on Capital Punishment)], it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed and weighed against each other when they are presented in a concrete case."
>
> * * *
>
> "For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of

> circumstances would ever be really complete."[23]

In light of the various devices suggested by Petitioner and its amici for restraining punitive awards, the following observation from *McGautha* is particularly cogent:

> "To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment."

VI

PETITIONER DANGEROUSLY BLENDS THIS COURT'S FUNCTION WITH RESPECT TO INTERPRETING FEDERAL STATUTES WITH ITS ROLE IN DETERMINING THE CONSTITUTIONALITY OF STATE STATUTES.

Petitioner's attempt to appeal to this Court as a Superlegislature, dictating policy to the states, is no better illustrated than in its blending of principles of statutory construction with those of constitutional review. It argues as follows:

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[23] It is this very reasoning process which is attacked by Petitioner and found to be violative of Due Process. At page 7 of Petitioner's Brief, it attempts to demonstrate the lack of Due Process in Alabama's punitive damage system by quoting from *Central Alabama Elec. Corp. v. Tapley*, 546 So.2d 371 (Ala. 1989): "We can envision no set of carved-in-granite standards that would guide every jury in every conceivable case." Far from being a violation of Due Process, such sentiments echo those of the majority in *McGautha*. Indeed, seven years ago, Justice O'Connor joined the dissent of Chief Justice Burger, in which it was argued that the application of a proportionality analysis under the Eighth Amendment to all criminal sanctions would lead to rulings that either would be essentially arbitrary or would call for "Solomonic wisdom." *Solem v. Helm*, 463 U.S. 277, 305, 314 (1983).

"In *Electrical Workers v. Foust*, 442 U.S. 42 (1979), this Court banned punitive damages in union representation cases, noting, at page 50, that 'the impact of these windfall recoveries is unpredictable and potentially substantial.'"

* * *

"In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court banned punitive damages in suits against municipal corporations in 42 U.S.C. § 1983 actions.

"In *Smith v. Wade*, 461 U.S. 30 (1983), cogent objections to punitive damages generally were set forth (Rehnquist, J., dissenting).

"The concerns regarding punitive damages expressed in the above cases are, it is submitted, Due Process concerns, applicable here." (Brief of Petitioner, at 8-19.)

In *Foust*, the Court interpreted the Railway Labor Act as not providing for punitive damages, while in *Fact Concerts* and *Smith v. Wade*, the Court construed the Civil Rights Act of 1871 to allow for punitive damages generally, but not against municipalities.

In his dissent in *Smith v. Wade*, Justice Rehnquist clearly identified the "concerns" at issue—and they were not "due process concerns":

> ". . . a forthright inquiry into the intent of the 42d Congress and a balanced consideration of the public policies . . . ." (461 U.S. at 56; 103 S.Ct. 15 1640.)

Nowhere in Justice Rehnquist's dissenting opinion is there the slightest hint that the Due Process Clause precludes the states from conducting their own "balanced consideration of public policies."

According to Petitioner's distorted view of Federalism, this Court's interpretation of the intent of Congress with respect to a punitive damage remedy in the Railway Labor and Civil

Rights Acts becomes the measure of what the states are constitutionally permitted to accomplish under the Due Process Clause.

By equating this Court's "statutory interpretation" function with its "constitutional review" function, Petitioner wholly deprives the States of their role in the federal system.

Justice Rehnquist's dissent in *Smith v. Wade*, while critical of punitive damages as a matter of federal policy in section 1983 actions, was far from a harbinger of any constitutional restrictions on the states' right to maintain their own, long-established punitive damage systems. Indeed, an acute sensitivity to federalism concerns fueled Justice Rehnquist's dissent:

> "When federal courts enforce punitive damages awards against local officials they intrude into sensitive areas of sovereignty of coordinate branches of our Nation, thus implicating the most basic values of our system of federalism." (461 U.S. at 92; 103 S.Ct. 1654.)

VII

PETITIONER'S EXPANSIVE VIEW OF SUBSTANTIVE DUE PROCESS MAKES THE CONSTITUTIONALIZATION OF STATE COMPENSATORY DAMAGE SYSTEMS INESCAPABLE.

Petitioner states its Due Process challenge to state punitive damage awards as follows:

> "Standardless Jury Discretion. Alabama law for determining the amount of punitive damages, and the jury instruction in this case authorized thereunder, are impermissibly vague and incomprehensible, and therefore void under the Due Process Clause of the Fourteenth Amendment, because they contain no standard for determining the amount to be awarded." (Brief of Petitioner at 9.)

If this theory is adopted, then not only state punitive damage

and criminal sentencing[24] systems must be constitutionalized but state compensatory damage systems as well.

Compensatory awards for general damages in a personal injury action are proportional only to "a detriment for which monetary compensation cannot be ascertained with any demonstrable accuracy" and for which "no method is available to the jury by which it can objectively evaluate such damages." *Beagle v. Vasold*, 65 Cal.2d 166 (1966). On appeal, a "shock the conscience" standard is employed. *Bertero v. National General Corp.*, 13 Cal.3d 43, 61, 118 Cal.Rptr. 184 (1974).

As compensatory awards are "open-ended" and subject to substantially less proportionality and less standards than punitive awards, are all of the States depriving tortfeasors of procedural and substantive Due Process? A merely inadvertent automobile driver or a faultless product manufacturer, who renders another quadriplegic, and stands to lose 100% (not just 1/2 of 1%) of his assets, is surely entitled to at least as much due process protection against "open-ended" and "standardless" awards.

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[24]A myriad of state laws typically set a very wide range of punishment for a given offense and give judges almost unreviewable discretion in fixing sentences—laws which have been held not to violate due process. *See Garcia v. United States*, 769 F.2d 697, 699, n.1 (11th Cir. 1985). As this Court has noted in *dicta*, "legislatures [are] free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). *See Stevens v. Armontrout*, 787 F.2d 1282, 1284 (8th Cir. 1986) [upholding against due process challenge a 200-year bench sentence under a statute that permitted sentence between ten years and "any number of years"]. In *McMillan v. Pennsylvania*, 106 S.Ct. 2411, 2420 (1986), the Court rejected a due process challenge to a statute that prescribed a preponderance of the evidence standard for determining facts relating to sentencing, noting that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." Even in capital sentencing, the constitutional limits are based on the Eighth Amendment and not the Due Process Clause. *See Gregg v. Georgia*, 428 U.S. 153 (1976), and *Lockett, supra.*

Petitioner and its amici seek to have this Court set an "outer limit" on punitive damage awards. Just as nine state legislatures have seen fit to do so, many states, as well as Congress, have set "outer limits" on various categories of compensatory awards.[25] If substantive due process principles mandate an "outer limit" on punitive awards (regardless of the heinousness of the defendant's conduct, its assets, or the amount of compensatory damages), then would these same principles serve to "constitutionalize"[26] the even greater "standardless discretion" afforded juries in assessing compensatory damages? Is there a rational—let alone a constitutional—distinction?

CONCLUSION

"The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The power reserved to the

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[25]*See, e.g., Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) [upholding statutory limit on liability in the event of a nuclear accident]; *Johnson v. St. Vincent Hospital Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980); and *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 695 P.2d 665 (1985) [upholding limitation on compensatory damages in medical malpractice cases]; the Warsaw Convention, 49 Stat., Part II, 3000, Treaty Series No. 876 [limiting personal injury and death damages in international airplane crash litigation]; Speiser, *Recovery for Wrongful Death* (2d ed. 1975), The Lawyers Cooperative Publishing Co., Ch. 7, "Limitations On Death Damages"; and various state "no-fault" automobile liability systems (42 A.L.R.3d 229).

[26]"*New York Times Co. v. Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander." *Dun & Bradstreet, Inc. v. Greenmoss Builders Inc.*, 105 S.Ct. 2939, 2949, 472 U.S. 749, 766, 86 L.Ed.2d 593 (1985) (Justice White, concurring).

several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *"The Federalist Papers"* No. 45 (James Madison).

"None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom." Benjamin N. Cardozo, The Storrs Lectures, delivered at Yale University, Lecture III, from *"The Nature of the Judicial Process,"* Yale University Press, 1921, at 115.

Respectfully, the judgment of the State Supreme Court should be affirmed.

Respectfully submitted,

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California Trial Lawyers Association

APPENDIX A

TRIAL AND REVIEWING COURT ACTION ON PUNITIVE AWARDS
(1922 — 1986)

Morris v. Standard Oil Co. 188 Cal. 468 (1922)	$	25,000	Remanded for new trial re damages; excessive.
Wilkinson v. Singh 93 Cal.App. 337 (1928)		1,500	Remanded for new trial unless remittitur of $300 accepted.
Livesey v. Stock 208 Cal. 315 (1929)		50,000	New trial ordered unless remitted for $10,000.
Booth v. Peoples Finance etc. Co. 124 Cal.App. 131 (1932)		1,500	Remanded for new trial unless remitted for $500.
Washer v. Bank of America 87 Cal.App.2d 501 (1948)		80,000	Reversed by trial judge on JNOV; affirmed.
Finney v. Lockhart 35 Cal.2d 161 (1950)		2,000	Affirmed.

Luke v. Mercantile Acceptance Corp. 111 Cal.App.2d 431 (1952)	2,500	Retrial ordered on issue of punitive damages.
Larrick v. Gilloon 176 Cal.App.2d 408 (1959)	10,000	Upheld.
DiGiorgio Fruit Corp. v. AFL-CIO 215 Cal.App.2d 560 (1963)	50,000	Upheld.
Toole v. Richardson-Merrell, Inc. 251 Cal.App.2d 689 (1967)	500,000	New trial ordered unless remitted to $250,000.
Oakes v. McCarthy Co. 267 Cal.App.2d 231 (1968)	77,500	Trial judge reduced to $59,300; affirmed.
Cunningham v. Simpson 1 Cal.3d 301 (1969)	25,000 Unsegregated	Unsegregated damages excessive; remanded for new trial.
Ferraro v. Pacific Fin. Corp. 8 Cal.App.3d 339 (1970)	33,000	Affirmed.

Fletcher v. Western Nat'l Life Ins. Co. 10 Cal.App.3d 376 (1970)	640,000	Reduced to $180,000.
Wetherbee v. United Ins. Co. 18 Cal.App.3d 266 (1971)	500,000	Reduced to $200,000.
Forte v. Nolfi 25 Cal.App.3d 656 (1972)	Unsegregated Damages	Remanded on issue of damages; $20,000 punitives excessive.
Field Research Corp. v. Patrick 30 Cal.App.3d 603 (1973)	150,000	Upheld.
Schroeder v. Auto Driveaway Co. 11 Cal.3d 908 (1974)	10,000	Upheld.
Bertero v. National Gen. Corp. 13 Cal.3d 43 (1974)	625,000	Affirmed as proper.

Roemer v. Retail Credit Co. 44 Cal.App.3d 926 (1975)	250,000	Affirmed.
Farmy v. College Housing, Inc. 48 Cal.App.3d 166 (1975)	45,000	Trial court reversed damages; insufficient evidence for punitive.
Beck v. State Farm Mut. Auto. Ins. Co. 54 Cal.App.3d 347 (1976)	75,000	Trial judge denied JNOV; appellate court modified to strike all punitives.
Allard v. Church of Scientology 58 Cal.App.439 (1976)	250,000	Reduced by appellate court to $50,000.
Weisenburg v. Molina 58 Cal.App.3d 478 (1976)	28,240	Affirmed.
Merlo v. Standard Life & Acc. Ins. Co. 59 Cal.App.3d 5 (1976)	500,000	Reversed as excessive.

Zhadan v. Downtown L.A. Motors 66 Cal.App.3d 481 (1976)	175,000 first trial	Trial judge ordered new trial unless remitted to $50,000; plaintiff did not remit. (App. ct. affirmed trial judge.)
Little v. Stuyvesant Life Ins. Co. 67 Cal.App.3d 451 (1977)	2,500,000	Appellate court remanded for new trial unless reduced to $250,000.
Henderson v. Security Nat'l Bank 72 Cal.App.3d 764 (1977)	125,000	Reversed punitive award due to insufficient evidence; affirmed.
Neal v. Farmers Ins. Exch. 21 Cal.3d 910 (1978)	1,518,637	Reduced to $740,000.
Walker v. Signal Companies, Inc. 84 Cal.App.3d 982(1978)	215,000	Affirmed.
Grimshaw v. Ford Motor Co. 119 Cal.App.3d 757 (1981)	125,000,000	Reduced by trial court to $3.5 million; affirmed.

Egan v. Mutual of Omaha 24 Cal.3d 809 (1979)	5,000,000	Reversed as excessive.
Agarwal v. Johnson 25 Cal.3d 932 (1979)	47,000	Affirmed.
Bindrim v. Mitchell 92 Cal.App.3d 61 1979)	25,000	Affirmed.
Delos v. Farmers Ins. Group Inc. 93 Cal.App.3d 642 (1979)	4,000,000	Trial Court ordered new trial unless remitted to $350,000; affirmed on appeal.
Zhadan v. Downtown L.A. Motors 100 Cal.App.3d 821 (1979)	90,000 second trial	Damages in second trial affirmed on appeal
Miller v. Elite Ins. Co. 100 Cal.App.3d 739 (1980)	150,000	Affirmed.

Rosener v. Sears, Roebuck & Co. 110 Cal.App.3d 740 (1980), *appeal dismissed* 450 U.S. 1051 (1981)	10,000,000	Remanded for new trial unless remitted for $2.5 million.
Schomer v. Smidt 113 Cal.App.3d 828 (1980)	16,000	Affirmed.
Pistorius v. Prudential Ins. Co.	1,000,000	Affirmed.
Chodos v. Insurance Co. of North America 126 Cal.App.3d 86 (1981)	200,000	Affirmed.
Godfrey v. Steinpress 128 Cal.App.3d 154 (1982)	60,000	Affirmed.
Austero v. Washington National Ins. Co. 132 Cal.App.3d 408 (1982)	200,000	Affirmed.

Burnett v. National Enquirer, Inc. 144 Cal.App.3d 991 (1983)	1,300,000	Trial court remitted to $750,000. Appellate court remanded for new trial unless remitted to $150,000.
Vossler v. Richards Mfg. Co. 143 Cal.App.3d 952 (1983)	500,000	Affirmed.
Krusi v. Bear Stearns & Co. 144 Cal.App.3d 664 (1983)	50,000	Remanded.
Seaman's Direct Buying Service Inc. v. Standard Oil Co. 36 Cal.3d 752 (1984)	11,000,000	Trial judge ordered new trial unless remitted to $7 million; underlying judgments reversed by appellate court for retrial.
Moore v. American United Life Ins. Co. 150 Cal.App.3d 610 (1984)	2,500,000	Affirmed.

Betts v. Allstate Ins. Co. 154 Cal.App.3d 688 (1984)	3,000,000	Affirmed.
Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. 155 Cal.App.3d 381 (1984)	80,000	Affirmed.
Fleming v. Safeco Ins. Co. 160 Cal.App.3d 31 (1984)	116,000	Affirmed.
Goshgarian v. George 161 Cal.App.3d 1214 (1984)	15,000	Vacated by appellate court unless remitted to $7,500.
Sanchez-Corea v. Bank of America 38 Cal.3d 892 (1985)	1,000,000	Trial judge ordered new trial; Supreme Court reversed order.
Sprague v. Equifax Inc. 166 Cal.App.3d 1012 (1985)	5,000,000	Trial judge ordered new trial unless remitted to $1 million; appellate court affirmed trial judge.

Jahn v. Brickey 168 Cal.App.3d 399 (1985)	250,000	Trial judge ordered new trial unless remitted to $100,000; appellate court affirmed trial court.
Wayte v. Rollins Int'l, Inc. 169 Cal.App.3d 1 (1985)	1,500,000	Remitted to $308,000.
Frazier v. Metropolitan Life Ins. Co. 169 Cal.App.3d 90 (1985)	8,000,000	Trial court remitted to $2 million; appellate court vacated entirely.
Greenfield v. Spectrum Inv. Corp. 174 Cal.App.3d 111 (1985)	442,500	Trial judge ordered new trial unless remitted to $215,000; appellate court reinstated judgment because of failure to state reasons for new trial.
California Shoppers, Inc. v. Royal Globe Ins. Co. 175 Cal.App.3d 1 (1985)	2,000,000	JNOV granted by trial judge; affirmed by appellate court.

Troensegaard v. Silvercrest Ind. Inc. 175 Cal.App.3d 218 (1985)	55,000	Punitive damages vacated.
Ball v. Posey 176 Cal.App.3d 1209 (1986)	40,000	Affirmed.
Ramona Manor Convalescent Hosp. v. Care Enterprises 177 Cal.App.3d 1120 (1986)	2,500,000	Reversed for retrial.
Pusateri v. E.F. Hutton & Co., Inc. 180 Cal.App.3d 247 (1986)	160,000	Affirmed.
Campbell v. McClure 182 Cal.App.3d 806 (1986)	100,000	Affirmed
Duggan v. Hasso 185 Cal.App.3d 1184 (1986)	1,100,000	Reversed for trial.

Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co. 185 Cal.App.3d 1149 (1986)	250,000	Vacated on appeal.
Travelers Ins. Co. v. Lesher 187 Cal.App.3d 169 (1986)	1,500,000	Vacated on appeal.
Hobbs v. Eichler 164 Cal.App.3d 174 (1985)	220,000	Affirmed.
Horn v. Guaranty Chevrolet 270 Cal.App.2d 447 (1969)	15,000	Affirmed.
MacDonald v. Joslyn 275 Cal.App.2d 282 (1969)	50,000	Affirmed.
Anglo-American Gen'l v. Jackson Life Ins. Co. 83 F.R.D. 41, applying Calif. law (1979)	100,000	Remitted by trial court $5,000.